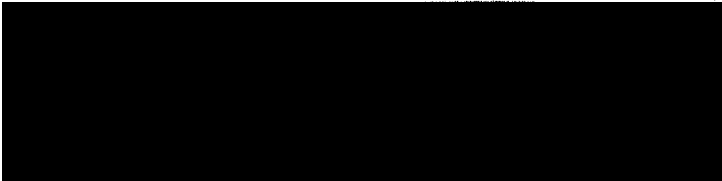


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U.S. Department of Homeland Security  
20 Mass. Rm. A3042, 425 I Street, N.W.  
Washington, DC 20529



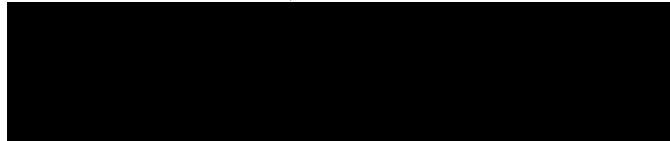
U.S. Citizenship  
and Immigration  
Services



FILE: EAC 02 115 51064 Office: VERMONT SERVICE CENTER

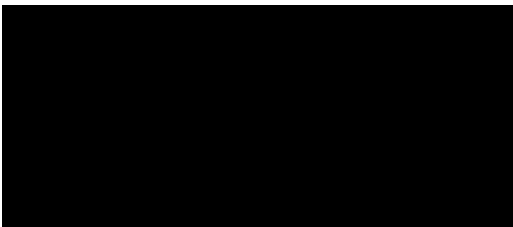
Date: JUL 13 2004

IN RE: Petitioner:  
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the  
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

*Mari Johnson*  
Robert P. Wiemann, Director  
Administrative Appeals Office

identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

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**DISCUSSION:** The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a hospital that seeks to employ the beneficiary as a registered nurse. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The director denied the petition because the proffered position is not a specialty occupation. On appeal, counsel submits a brief and previously submitted evidence.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the

director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The petitioner is seeking the beneficiary's services as a registered nurse. Evidence of the beneficiary's duties includes: the Form I-129; the January 23, 2002 letter accompanying the Form I-129; and the petitioner's response to the director's request for evidence. According to this evidence, the beneficiary would perform duties that entail, in part, caring for patients in the medical-surgical unit who suffer from injuries, serious illnesses, and uncommon diseases. The letter stated that, except for attending meetings, education classes, and performing preparatory work, the beneficiary would spend all of her time there. The petitioner stated that a candidate must possess a bachelor's degree or its equivalent in nursing.

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the criteria found at 8 C.F.R. § 214.2(h)(4)(iii)(A). The director stated that the Department of Labor's (DOL) *Occupational Outlook Handbook* (the *Handbook*) reveals that the proffered position's duties resemble those of a registered nurse and that there are three major educational paths to registered nursing: an associate degree in nursing, a bachelor of science degree in nursing, and a diploma. Furthermore, the director stated that the evidence does not indicate that a bachelor's degree is the standard requirement for the proffered position.

On appeal, counsel states that the proffered position qualifies as a specialty occupation, and counsel refers to the description of the proffered position, a November 27, 2002 memorandum, letters from alleged independent medical experts, a *Journal of the American Medical Association (JAMA)* study, information about degree programs in nursing, a press release, and evidence from the Department of Veterans Affairs (VA).

Upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

The petitioner's January 23, 2002 letter claimed that CIS has already determined that the proffered position is a specialty occupation since it has approved other, similar petitions in the past. To support this statement, the record contains over 30 approval notices. This record of proceeding does not, however, contain all of the supporting evidence submitted to the Vermont Service Center in the prior cases. In the absence of all of the corroborating evidence contained in the record of their proceedings, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the petitions were parallel to the offered position. Furthermore, each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). If the other nonimmigrant petitions were approved based on identical facts that are contained in the current record, those approvals would be in violation of paragraph (h) of 8 C.F.R. § 214.2, and would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See, e.g., *Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or

any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

Counsel claims that the petitioner satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) because the November 27, 2002 memorandum (the nurse memo) stated that critical care nurses and other specialty care nurses qualify for H-1B classification. Counsel therefore maintains that the proffered position qualifies as a specialty occupation: it is a critical care and specialty nursing position that entails working in the petitioner's medical-surgical unit. Counsel states that the nature of the proffered position's duties involves such specialization and complexity as to require the attainment of a baccalaureate degree.

The assertions do not prevail in establishing that the proffered position qualifies as a specialty occupation under the first criterion. Indeed, the nurse memo acknowledged that an increasing number of nursing specialties, such as critical care and operating room care, require a higher degree of knowledge and skill than a typical RN or staff nurse position.<sup>1</sup> Nevertheless, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation.<sup>2</sup>

CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. While the nurse memo specifically states that a petitioner may be able to demonstrate, through affidavits from independent experts or other means, that the nature of the position's duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent), CIS maintains discretion to use as advisory opinions statements submitted as expert testimony. *Matter of Caron*

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<sup>1</sup> Memorandum from Johnny N. Williams, Executive Associate Commissioner, INS Office of Field Operations, *Guidance on Adjudication of H-1B Petitions Filed on Behalf of Nurses*, HQISD 70/6.2.8-P (November 27, 2002).

<sup>2</sup> It is worth noting that the nurse memo also mentions that certification examinations are available to such registered nurses who may work in such nursing specialties and possess additional clinical experience, but who are not advanced practice nurses.

*International*, 19 I&N Dec. 791 (Comm. 1988). CIS must be satisfied that the ultimate employment of the alien is in a specialty occupation, regardless of the position's title.

CIS often looks to the *Handbook* when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. After a careful review of the *Handbook*, the AAO finds that the beneficiary's proposed duties closely resemble those performed by registered nurses who provide direct patient care by observing, assessing, and recording symptoms, reactions, and progress; assisting physicians during treatments and examinations; administering medications; and assisting in convalescence and rehabilitation. Hospital nurses, the *Handbook* states, are mostly staff nurses who provide bedside nursing care and carry out medical regimens. These nurses, the *Handbook* reports, are usually assigned to one area such as surgery, maternity, or intensive care. Consequently, the proffered position's duty of caring for patients in the medical-surgical unit who suffer from injuries, serious illnesses, and uncommon diseases would be performed by a registered nurse as delineated in the *Handbook*.

The *Handbook* states the following about the training and educational requirements for registered nurse positions:

There are three major educational paths to registered nursing: associate degree in nursing (A.D.N.), bachelor of science degree in nursing (B.S.N.), and diploma. . . . Generally, licensed graduates of any of the three program types qualify for entry-level positions as staff nurses.

The *Handbook* continues:

. . . [S]ome career paths are open only to nurses with bachelor's or advanced degrees. A bachelor's degree is often necessary for administrative positions, and it is a prerequisite for admission to graduate nursing programs in research, consulting, teaching, or a clinical specialization.

Thus, according to the *Handbook*, candidates would not require a bachelor's degree for entry into the proffered position.

The evidence contained in the record fails to show that the petitioner established that a baccalaureate degree in a specific specialty is the minimum for entry into the occupation. The record shows that the petitioner had asserted that the VA has determined that registered nurse positions are specialty occupations because only candidates holding bachelor's degrees can occupy the positions. This assertion is weak. In the first place, the VA document entitled "Nurse Qualification Standard," revises the policy on the qualification standard for all persons appointed as registered nurses, but it does not establish that a baccalaureate or higher degree or its equivalent is the normal minimum for entry into the offered position. For instance, Appendix B of the document does not elaborate on whether the grade of nurse I (levels 1-3), which require either associate's or bachelor's degrees in nursing, are registered nurse positions assigned to a hospital's surgery, emergency care, maternity, cardiovascular telemetry unit, medical-surgical, or intensive care units. Thus, we disagree with

counsel's claim in the September 6, 2002 letter that the VA document portrays a specialty nurse position at the grade of nurse II or higher.

The December 18, 1998 press release reveals that the VA and the American Association of Colleges of Nursing (AACN) simply seek to provide nurses with innovative academic opportunities to obtain baccalaureate or higher degrees in a convenient setting. On page 2, the press release stated that only 31 percent of registered nurses hold bachelor degrees, and 32 percent hold associate's degrees, plainly indicating that a bachelor's degree is not the minimum requirement for entry into the proffered position. Furthermore, the *Handbook* reveals that employers accept candidates with associate degrees in nursing. Thus, based on the evidence in the record, the petitioner fails to establish the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The evidence in the record fails to establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations. The nurse memo and the VA documentation are not probative in establishing the second criterion. Again, the mere fact that a nursing position has a title such as "critical care" does not necessarily mean that it qualifies as a specialty occupation. The AAO has already set forth the deficiencies in the VA document and the December 18, 1998 press release. The *JAMA* article simply discusses the patient-to-nurse ratio in hospitals. Counsel's September 6, 2002 letter stated "[d]ue to the shortage of registered nurses with baccalaureate degrees, the hospital is unable to switch to BA/BS required." Counsel further stated:

The present industry standard, for medical facilities employing registered nurses in these units, is baccalaureate degree in nursing preferred.

Last, counsel mentioned:

Because of the great need, hospitals and other medical facilities cannot adopt a policy that requires a baccalaureate degree. However, they will take a baccalaureate nurse over an associate degree nurse for these positions.

Although counsel claims to submit evidence that would support the statement "they will take a baccalaureate nurse over an associate degree nurse," there is no evidence in the record to this effect. The quoted statements from counsel emphasize that a bachelor's degree is not an industry-wide requirement. The other evidence in the record - the VA document and the AACN and JAMA articles - fail to establish the second criterion: that the industry requires a bachelor's degree.

Neither does the record contain evidence to establish that the particular position is so complex or unique that it can be performed only by a person with a degree.

The third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that it normally requires a degree or its equivalent for the position. The petitioner submitted an organizational chart, over 80 job postings for clinical nurse I and II positions, 1 posting for a registered nurse utilization management position, and 3 job profiles. The 80 job postings sought clinical nurse positions for a number of departments including the medical-

surgical intensive care unit, operating room, rehabilitation, cardiac progressive care, ambulatory surgery, emergency care, and cardiac progressive care unit. The minimum requirements section in the postings for clinical nurse I and II positions stated that the petitioner will accept a "[g]raduate of an approved diploma/degree nursing program with current R.N. Pennsylvania license." Only one posting stated that the petitioner prefers a B.S.N, and the one posting for the registered nurse utilization management position also stated that the petitioner merely prefers an B.S.N. The job profiles are for clinical nurse I, II, and III positions. In the job requirements section of the profiles the petitioner indicated that it accepts a nursing school diploma or an associates degree. The submitted postings and profiles strongly demonstrate that the petitioner normally does not require a degree or its equivalent for the proffered position.

The evidence in the record – the nurse memo, the JAMA article, the nursing programs, and the expert opinion letters - is inadequate to establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

Although counsel refers to the nurse memo to state that critical care and specialty nurse positions – such as the proffered position – require a bachelor's degree, the title of a nursing position such as "critical care" does not necessarily mean that the position qualifies as a specialty occupation. Instead, the actual duties of the proffered position are controlling.

The article from the *JAMA* and the information about nursing programs is not relevant in establishing that the proffered position requires a bachelor's degree in nursing. The article merely discussed improving the nurse to patient ratio, and the IU Northwest School of Nursing Program's philosophy statement seems nearly identical for the associate of science and bachelor of science degree programs. The associate of science program prepares its graduates "with the knowledge and skills to provide direct care to individuals within the family and community context." Graduates are a "competent provider of nursing care, a conscientious practitioner who practices within the legal and ethical parameters of nursing, and an accountable/responsible manager of care." Similarly, the bachelor of science graduate is "capable of practicing in a competing and responsible fashion as informed citizens in a dynamic and diverse society." According to the philosophy statement, the baccalaureate nursing education merely provides a "broad foundation in the sciences and liberal arts necessary for preparing professional nurses who are capable of practicing in a competent and responsible fashion as informed citizens in a dynamic and diverse society."

On appeal, counsel submits expert opinion letters. The individuals have, supposedly independently, written letters containing virtually identical passages. While we acknowledge that these individuals have endorsed the petitioner's position regarding the requirement for a bachelor's degree, the passages thereof appear to have been written by an unidentified third party. The exact wording, therefore, carries diminished weight, as it may not necessarily reflect the exact views of the person who signed it.

Beyond the decision of the director, no evidence in the record indicates that the beneficiary is qualified to perform the duties of the proffered position. There is no evidence that indicates that the beneficiary possesses a license to practice as a registered nurse, has passed a national licensing examination, or has an official

statement from the licensing authority that clearly indicates that the alien is eligible for temporary licensure and that the license can be obtained immediately upon entering the United States.

The record does contain a document entitled "An Act" that the Commonwealth of Pennsylvania enacted. Section one of the document states that the act shall be known and cited as "the Professional Nursing Law." The Professional Nursing Law provides, according to Section 5(c), that the State Board of Licensing (the Board) may admit to examination any person who has satisfactorily completed a nursing education program for the preparation of registered professional nurses in a country or territory not mentioned in other sections of the Professional Nursing Law who has been licensed, registered, or duly recognized there as a professional nurse provided such a program is considered by the Board to be equal to that required in this Commonwealth at the time such program was completed and who meets the requirements of character and preliminary education.

Again, no document is in the record from the Board attesting that the beneficiary may be admitted to examination. Consequently, we find that the beneficiary does not qualify to perform the duties of the proffered position. For this additional reason, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

**ORDER:** The appeal is dismissed. The petition is denied.